Supreme Court, U. S.
FILED
JUN 16 1978
MICHAEL RODAK, JR., CLERK

No. 77-1788

In the Supreme Court of the United States

SPRING TERM, 1978

SOL GOLDSTEIN, on his own behalf and on behalf of a class similarly situated,

Petitioner,

vs.

FRANCIS JOSEPH COLLIN, a/k/a **FRANK COLLIN**, and all persons acting in concert with him under the name of **The National Socialist Party of America**,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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June 16, 1978

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The petitioner Sol Goldstein respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Illinois entered in this proceeding on January 27, 1978.

OPINION BELOW

The order and opinion below is as follows:

No. 50176—Sol Goldstein, etc., respondent, vs. Francis Joseph Collin, etc., et al., petitioners.

The Circuit Court of Cook County denied a motion to dismiss a complaint for injunction seeking to restrain

defendants from marching and demonstrating in the Village of Skokie while wearing or displaying Nazi insignia. The Appellate Court denied a petition for leave to appeal under Rule 308 and defendants have petitioned this Court for leave to appeal. In *Village of Skokie* v. *National Socialist Party of America,* No. 49769, adopted this term, we held that the proposed march or demonstration and the display of Nazi insignia could not be enjoined. The petition for leave to appeal is allowed and, in the exercise of this Court's supervisory jurisdiction, it is ordered that the Circuit Court of Cook County dismiss the injunction complaint. Clark, J. took no part.

The opinion referred to in the foregoing order and opinion is set forth in the Appendix hereto.

JURISDICTION

The judgment of the Supreme Court of Illinois was entered on January 27, 1978. A timely petition for rehearing was denied on March 30, 1978, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

1. Whether the First Amendment raises an absolute bar to petitioners' complaint, held to state a valid cause of action under Illinois tort law and sufficient grounds for injunctive relief under Illinois equity practice, wherein holocaust survivors living in unique numbers in Skokie, Illinois, seek only to vindicate their private right to prevent respondents' intentionally traumatic use of Nazi-style dress and paraphernalia at a demonstration in that Village.

2. Whether petitioners' Due Process rights were violated by the Illinois Supreme Court's summary dismissal of petitioners' complaint without affording them, on review, any opportunity to brief or argue the merits of the issue.

STATEMENT OF THE CASE

Petitioner and the class he represents ("petitioners") are Jewish survivors of the Nazi holocaust in Europe. They reside in the Village of Skokie, Illinois ("Skokie"). Their numbers—in the thousands—have long since made Skokie the chosen and well known refuge of most of such survivors now living in the greater Chicago area. (Complaint, ¶¶2, 6, 19, 20 & 25)

Petitioners carry with them certain known psychological scars from the events of the holocaust (Affidavit of Dr. Lawrence Z. Freedman, attached to Complaint):

> 2. During the period in which Adolph Hitler was the head of government in Germany, the Jews in that country and those which its armies subsequently conquered lived under a reign of terror. The Jews lived in dread of outrage or death: the total lack of security for the individual and his inability to know when he would be the target of terrorism, isolation and death.
>
> 3. Clinical studies have demonstrated that profound trauma inflicted upon individuals and groups from causes which cannot be avoided and from which there is no escape suffer from depression, withdrawal and intense anxiety—in short, terror.
>
> 4. Even when the circumstances which created these pathological states are removed, the traumatized individual remains sensitized and vulnerable to signs and symbols, as well as to the substance of their recurrences.

Petitioners' complaint traces the evolution of Nazism in Europe from "Gangs of brown-shirted Nazis terroriz[ing] Jews" (¶13) up through the organized massacre of mil-

lions "under the aegis of the brown shirt and swastika which were the Nazis' symbols." (¶15)

Respondents are a small group of Chicago residents who identify themselves as Nazis. As such, they use the insignia and symbols of the Nazi party of Adolph Hitler, notably the brown shirt uniform and the swastika. It is with those trappings that respondents wish to conduct an avowedly anti-Jewish demonstration in Skokie. Respondents' specific intent in choosing Skokie as the place for such a demonstration is to inflict severe physical and emotional distress upon the many holocaust survivors known to reside there. (Complaint, ¶¶4-5, 17-18, 25-26)

Respondents' conduct in Skokie will cause the petitioners, unavoidably, to reexperience their former terror at Nazi hands. No matter how the individual petitioners might respond to respondents' appearance in Skokie—with anger, avoidance, resignation or mere annoyance—as a group they will internally and inescapably relive their massive terror from the past. (Complaint, ¶¶22-24) Among other aspects of this phenomenon, the petitioners will experience an overwhelming sense of anxiety, a paralyzing sense of helplessness, turmoil and anguish in assessing a response and "psychosomatic symptoms of physical ailments and pain suffered during the holocaust."* (Freedman affidavit, ¶6)

---

* See also Krystal, *Massive Psychic Trauma*, 8-9, 61, 14-15, 20, 28, 102, 327, 192, 35, 78, 195 (1968) (This volume, based on a symposium held at Wayne State University, is a comprehensive theoretical and clinical study of what has come to be known as the "survivor syndrome." It discusses the lasting health disturbances of the concentration camp survivors and the symptomology of the syndrome which includes intense adverse physical and emotional reactions to symbols of Nazi persecution and murder.)

Moreover:

> The sense of harmful assault is greatly reenforced when such a reenactment is forced upon persons *within the very community in which they live.* Freedman affidavit, ¶5 (Emphasis added).

Thus, petitioners, by their complaint sought to enjoin, not respondents' march, but respondents' use of Nazi paraphernalia, including swastikas, brown shirts and jack-boots which would transmute the march into a Nazi style demonstration.

Petitioners' allegations and supporting affidavit were never denied or questioned by respondents, or rejected by any Illinois court. The factual record before this Court is therefore the petitioners' complaint and affidavit alone.

Respondents' only pleading was a motion to dismiss the complaint, setting up five defenses: failure to state a substantive cause of action; lack of equitable jurisdiction; First Amendment privilege; lack of standing; and a prior pending action brought against them by the Village of Skokie, in its corporate capacity, to prevent a breach of the peace. The trial court upheld the complaint against the multi-pronged attack after extensive briefing and oral argument.

The trial court thus held, among other things, that petitioners had stated (1) a valid state cause of action under the Illinois tort of intentional infliction of emotional distress, and (2) sufficient grounds for injunctive relief under Illinois principles of equity.* Those two holdings, as will

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* At the time respondents' motion to dismiss was denied, an injunction against the Nazi demonstration was in effect as a result of proceedings brought by the Village of Skokie, *Village of Skokie* v. *National Socialist Party*, 77 CH 2702, *aff'd in part, reversed in part*, 51 Ill. App. 3d 279, *reversed*, 373 N.E. 2d 21 (Ill. 1978). Hence, petitioner, here, did not seek injunctive relief during the arguments directed to the pleadings.

appear hereinafter, were never certified for interlocutory review pursuant to Illinois appellate procedure and have never been reversed or modified on appeal. The trial court's rulings on state law therefore stood as law of the case when the Illinois Supreme Court passed on the Constitutional issue on January 27, 1978. They retain that status here.

The trial court, however, certified for interlocutory review the question under the federal constitution raised as a defense to the state cause of action:

> Whether plaintiff seeks to enjoin an activity protected by the First and Fourteenth Amendment to the United States Constitution.

Thereafter, pursuant to state practice rules, respondents petitioned the Illinois Appellate Court for the discretionary interlocutory appeal it could grant. S.H.A. 110A, §308, Ill. Sup. Ct. Rule 308. Such a petition is akin to a petition for writ of certiorari in this Court. Review, if granted, would be limited to the question certified. The petition for interlocutory review was denied.

Next, respondents sought review of that denial by petitioning for leave to appeal to the Illinois Supreme Court. The practice rules governing interlocutory appeals and Supreme Court appeals in Illinois both provide for the filing of briefs and other proceedings on the merits only in the event petitions for leave to appeal are allowed.

In its one-paragraph order and opinion dated January 27, 1978, the Illinois Supreme Court not only allowed respondents' petition for leave to appeal, but also directed the trial court to dismiss petitioners' complaint on the merits of the First Amendment issue certified. No arguments or briefs on the merits were taken at that time, nor permitted when petitioners later sought a "rehearing." Thus, petitioners were denied any hearing on the merits in the course of the review proceedings.

As stated by the United States District for the Northern District of Illinois (J. Bernard M. Decker) in commenting on the instant case (while considering another facet of the Skokie litigation):

> Immediately after vacating the village's injunction, the Illinois Supreme Court granted interlocutory review in *Sol Goldstein* v. *Franklin Collin*, an action by a resident of Skokie seeking to enjoin the planned demonstration on the grounds that it would harm him as a survivor of the Nazi Holocaust in WWII. *The Court summarily ordered the action dismissed without briefing or argument. . . .* This Court, of course, expresses no opinion as to the merits of plaintiffs' position in that case. *Collin* v. *Smith*, 77 C 2982 N.D. Ill. slip op., pages 10-11, fn 5 (Emphasis added.)

The Supreme Court of Illinois, in this case, rested its holding on one authority—a case in which petitioners were never parties nor participants. On the day of the judgment below, the Illinois Supreme Court held in a separate case that Skokie, *as a municipality*, could not constitutionally obtain injunctive relief against the manner of respondents' proposed demonstration. Its opinion (Appendix hereto) concluded that, despite the admittedly provocative nature of the Nazi swastika, the municipality could not bar its use under the "fighting words" doctrine, nor out of "anticipation of a hostile audience. . . ." Appendix, p. 12. This is the conclusion upon which the judgment below rests.

The Illinois Supreme Court viewed petitioners' case to be so completely undifferentiable under the First Amendment from that of the municipality, Skokie, that its opinion disposing of the latter sufficed to dispose of the former. However brief the opinion below may be, it clearly evinces a holding that as a broad proposition of First Amendment law the disputed elements of respon-

dents' conduct "could not be enjoined"—that a municipality's inability to assert the "fighting words" doctrine against respondents meant, *ipso facto,* that individual plaintiffs facing irreparable, tortious injury at their hands could not conceivably obtain equitable relief consistently with the First Amendment.

Upon the Illinois Supreme Court's denial of a rehearing on March 30, 1978, its order directing the dismissal of petitioners' complaint became a final adverse order although no hearing was ever held on the merits of petitioners' claim. The Illinois Supreme Court's mandate has been stayed pending the termination of proceedings in this Court.

REASONS FOR GRANTING THE WRIT

I.

THE HISTORICALLY UNIQUE SITUATION OF THE PETITIONERS, AND THE NARROW EQUITABLE REMEDY THEY SEEK, CALL FOR A CLEAR DEFINITION OF A STATE'S POWER TO VINDICATE COMPELLING PRIVATE RIGHTS IN A MANNER CONSISTENT WITH THE FIRST AMENDMENT.

From *Near* v. *Minnesota,* 283 U.S. 697 (1931), through *Organization for a Better Austin* v. *Keefe,* 402 U.S. 415 (1971), this Court has depicted a sphere of *private* interests which the states, even under stringent First Amendment limitations, retain their traditional jurisdiction to protect. The instant case has revealed the most compelling need for further definition of the boundaries of that sphere. A sadistic injury at once historic and novel is about to occur. Because the circumstances have, in *public* litigation,* been held beyond the states' Constitutional power to prevent, neither briefs, nor evidence, nor a chancellor's consideration have been entertained in this private case. This is the petitioners' final plea for a hearing.

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* The Illinois Supreme Court has overturned an injunction granted to the Village of Skokie in a case brought by *Skokie* to enjoin the march on the ground that it will create public disorder. A series of ordinances passed by Skokie designed, *inter alia,* to prevent or control a demonstration such as this, have been declared unconstitutional by the United States District Court, which order was affirmed by the Court of Appeals for the Seventh Circuit and is presently pending on petition for certiorari in this Court. These matters involved attempts by a state agency (the Village of Skokie) to regulate conduct on behalf of the general public. Contrariwise, the instant case seeks to vindicate private rights.

The First Amendment at most imposes limitations, not a ban, upon traditional state remedies against cognizable harms to individuals. The prior press restraint in *Near, supra,* was not addressed to "individual or private wrongs," 283 U.S. at 709, and the Court had no occasion, therefore, to pass on the states' power "to protect private rights according to the principles governing the exercise of the jurisdiction of courts of equity." *Id.* at 716.* *Chaplinsky* v. *New Hampshire,* 315 U.S. 568 (1941), recognized that in addition to expressions provoking violence there were other kinds, also unprivileged, "which by their very utterance inflict injury. . . ." *Id.* at 572. A recent example had been the facially peaceful picketers in *Milk Wagon Drivers Union* v. *Meadowmoor Dairies,* 312 U.S. 287 (1940), who were in fact terrorizing people through "the momentum of fear generated by past violence. . . . ," *Id.* at 294, and who were therefore held susceptible to a state chancellor's restraint. *Tinker* v. *Des Moines Independent Community School District,* 393 U.S. 503 (1969), upheld the wearing of an armband because the students, unlike the milk wagon drivers, merely sought to communicate, and neither intended nor caused any "intru[sion] in the school affairs or the lives of others." *Id.* at 514. *Organization for a Better Austin* v. *Keefe, supra,* condemned a judicial prior restraint because, as in *Near*:

> the injunction operates, *not to redress alleged private wrongs,* but to suppress, on the basis of previous publications, distribution of literature "of any kind" in a city of 18,000. 402 U.S. at 418-19 (emphasis added).

Gertz v. *Welch,* 418 U.S. 323 (1974), reaffirmed the states' jurisdiction to fashion remedies for defamation, within

* "Nor are we now concerned with questions as to the extent of authority to prevent publications in order to protect private rights according to the principles governing the exercise of the jurisdiction of courts of equity. See 29 Harvard L. Rev. 640." *Id.* at 716.

First Amendment guidelines, and noted the special need of ordinary private citizens for such state protection. Only one year ago, in *Zacchini* v. *Scripps-Howard Broadcasting Co.,* 45 L.W. 4954 (1977), this Court reversed an Ohio Supreme Court decision, strikingly similar to that below, that the First Amendment foreclosed Ohio's privacy-tort remedy for an unauthorized broadcast of a carnival act.

Had Scripps-Howard announced its tortious intentions in advance, giving Zacchini time enough to seek a preventive injunction conditioned upon payment of his fee, the situation foreseen but not decided in *Near* would have been squarely if less significantly presented. An Ohio court of equity would have been called upon to assess the irreparability of Zacchini's prospective injury—and would have been equally bound to recognize the several First Amendment principles which might limit his available relief. No matter how Zacchini's hypothetical case would have fared, however, it would have raised the Constitutional issue which has been envisioned since at least 1931 but never settled by this Court: To what extent, if at all, does the imminent commission of a tort affect the permissibility of prior equitable relief?

The petitioners' complaint presents a uniquely compelling set of facts for the foregoing issue to be addressed. It is difficult to imagine a clearer case wherein the basic freedom of verbal expression can be preserved, while a tortious and irreparable injury to be accompanied therewith can be isolated and prevented.

The petitioners acknowledge and indeed welcome the heavy burden of jurisdiction imposed upon the type of remedy they seek.* Holocaust survivors have good cause

* They so indicated below, as well, in their trial court memorandum at p. 52.

to cherish this country's freedoms. They also believe, however, that the survival of those freedoms has depended upon their responsible exercise. This Court's decisions, accordingly, seemed to recognize that the states were not powerless to afford appropriately tailored remedies for the *abuse* of freedoms to the injury of others.

Against that background, the strongest case for a state remedy seemed to be one where the victims of an abuse were recognizable individuals, where the abuse was a common law tort, and where it rose to such a degree of harm, irreparability and malice that remitting the victims to after-the-fact damages reasonably shocked the conscience of an American chancellor. That, of course, was the petitioners' case as it stood before the *nisi prius* court. And the simple question now is whether such a case is so patently repugnant to the federal Constitution that petitioners may not even attempt to meet their burden for relief.

The inescapable conclusion that emerges from the disposition below is that a state high court has deemed itself absolutely restrained by the First Amendment from allowing petitioners' case to proceed. It only "reluctantly" rejected the municipality's case (Appendix, p. 12), yet found no authority to permit state equity to even consider petitioners' case in its own right.* If this be a correct reading of Constitutional law, the states' jurisdiction to protect private interests is not what this Court has frequently implied or held it to be.

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* ". . . each court dealing with these precise problems (the Illinois Supreme Court, the District Court and this Court [of Appeals for the Seventh Circuit]) feels the need to apologize for its result." *Collin* v. *Smith,* Seventh Cir., Nos. 78-1381 and 78-1385, p. 26 (Sprecher, J. dissenting).

II.

THE RULING BELOW, RENDERED WITHOUT HEARING, DISPLAYS SUCH UTTER UNFAMILIARITY WITH PETITIONERS' CASE THAT IT EXEMPLIFIES THE NEED FOR DUE PROCESS AND A FACTUAL RECORD IN CONSTITUTIONAL ADJUDICATION.

Although they disagreed on the outcome, the majority and dissenter in *Milk Wagon Drivers Union, supra,* were of one mind on the necessity of careful factual inquiry to determine the First Amendment issue presented. Justice Frankfurter opened the majority's legal discussion by stating that an injunction,

> arising out of a particular controversy and adjusted to it, raises totally different constitutional problems from those that would be presented by an abstract statute with an overhanging and undefined threat to free utterance. To assimilate the two is to deny to the states their historic freedom to deal with controversies through the concreteness of individual litigation rather than through the abstractions of a general law. 312 U.S. at 292-3.

It was only on a careful review of the facts—with a reminder that it was the state's role to find them—that Frankfurter articulated the majority's Constitutional conclusion:

> [A]cts which in isolation are peaceful may be part of a coercive thrust when entangled with acts of violence. The picketing in this case was set in a background of violence. In such a setting it could justifiably be concluded that the momentum of fear generated by past violence would survive even though future picketing might be wholly peaceful. So the supreme court of Illinois found. We cannot say that such a finding so contradicted experience as to warrant our rejection. Nor can we say that it was written into the Fourteenth Amendment that a state through its courts cannot base

> protection against future coercion on an inference of the continuing threat of past misconduct. *Id.* at 294-5.

In dissent, Justice Black no more advanced an abstract proposition that the picketing "could not be enjoined" than did the majority that it could. "In this case," he wrote,

> in order to determine whether or not the state has overstepped constitutional boundaries, I find it necessary to give consideration to a number of factors, including the nature of the proceedings; the definiteness, indefiniteness and constitutional validity of the basic law upon which the injunction is said to rest; the findings and the evidence; the definiteness, indefiniteness and scope of the language of the injunction itself; and the alleged imminence of the threatened dangers said to justify the admitted abridgement of free speech. *Id.* at 302-3.

Justice Brandeis once said that "a judge rarely performs his functions adequately unless the case before him is adequately presented." *The Living Law,* 10 Ill. L. Rev. 461, 470 (1916). A decision made without advocacy at all, without that fundamental opportunity to be heard which is the heart of Due Process, *Griffin* v. *Illinois,* 351 U.S. 12 (1956); *Saunders* v. *Shaw,* 244 U.S. 317 (1917), is a decision fraught with the predictable dangers of misinformation and injustice. This failure to even provide opportunity for hearing before rendering judgment in the instant case is clear error of constitutional dimension. *Caritativo* v. *California,* 357 U.S. 549, 558 (1958); *Escoe* v. *Zerbst,* 295 U.S. 490, 494 (1935); *Morgan* v. *United States,* 298 U.S. 468 (1936); *Londoner* v. *Denver,* 210 U.S. 373, 386 (1908).

The lack of advocacy in the court below is evident in disturbing respects.

(1) Given a hearing, petitioners might have corrected the court's apparent notion that they relied on the "fighting words" theory advanced by the municipality. (See Appendix, pp. 6 & 8) They did not, and do not here. They

have only cited *Chaplinsky, supra,* to suggest that "words . . . which by their very utterance inflict *injury* . . .," 315 U.S. at 572 (emphasis added), not merely *insult,* may lose their Constitutional privilege.

(2) Given a hearing, petitioners might have educated the court that it was not merely hostility or offense with which they were concerned. (See Appendix, pp. 8-10) Petitioners alleged that they would be as palpably and deliberately injured by respondents' manner as if by some physical means, rather than psychological, they were forced to reexperience their former terror. Could a chancellor make "principled distinctions" not about offensiveness, *Cohen* v. *California,* 403 U.S. 15, 25 (1971), but between mere offense and tortious injury? The court below, never entertaining advocacy, never even saw the issue. Yet it is precisely that clear distinction between offense and severe emotional distress which Illinois and other states employ as a touchstone of liability in tort.

(3) Given a hearing, petitioners might have corrected the grave misunderstanding below about the nature and causation of the injury they fear. No court *informed* of petitioners' contentions could have seriously advised them to avert their eyes if they happened to see a swastika, Appendix, pp. 11-12, as if a disease could be checked by averting the eye from its rash. Petitioners' case is that a malicious thrust of Nazi symbolism into Skokie would find them in their streets or in their homes, penetrate through the scar tissue of their memories, and like a homing missile touch off an exploding replay of their terror. This contention, the respondents never denied. This contention, the chancellor thought deserving of an opportunity to prove. This contention, the Illinois Supreme Court never understood and, not understanding, dismissed. Yet in the very opinion which it quoted appears the doctrine that petitioners do invoke—that "substantial privacy interests are being invaded in an essentially intolerable manner." *Cohen* v. *California, supra,* 403 U.S. at 21, quoted at Ap-

pendix, p. 9. Like the insistent decibels of the sound trucks, *Kovacs* v. *Cooper*, 336 U.S. 77 (1948), petitioners contend that the respondents' *manner* of communicating in Skokie would make a holocaust survivor:

> not like the passer-by who may be offered a pamphlet [shown a swastika] in the street but cannot be made to take it [view it]. In his home or in his street he is practically helpless to escape this interference with his privacy by loud speakers [knowledge of a Nazi intrusion] except through the protection of the municipality [the chancellor]. *Id.* at 86-7.

Essentially, petitioners are seeking a reduction of the respondents' impact upon them to a nontortious level. The court below heard advocacy on neither the problem nor the proposed solution, yet felt itself competent to pass on the Constitutional dimensions of both.

(4) Finally, a hearing would have given petitioners the opportunity to develop a central fact about Skokie not even alluded to in the disposition below. In the 1961 case adopting for Illinois the tort of which petitioners complain, the court stated that:

> peace of mind is an interest of sufficient importance to receive protection from the law against intentional invasion of the kind involved here. *Knierim* v. *Izzo*, 22 Ill. 2d 73, 87 (1961).

The decisions of this Court have often recognized the special role of a person's residential community in maintaining that same interest in peace of mind. Starting from the general proposition that "the character of every act depends on the circumstances in which it is done," *Schenck* v. *United States*, 249 U.S. 47, 52 (1919), it has by now been established that:

> The nature of a place, "the pattern of its normal activities, dictate the kinds of regulations of time, place and manner that are reasonable." *Grayned* v. *City of Rockford*, 408 U.S. 104, 116 (1972).

Petitioners contend that Skokie, after the places of peril which their European towns had become, was in objective fact an historically unique haven, a place which holocaust survivors needed to find and nurture in common to reestablish a minimal sense of security. The states have the undoubted "power . . . to protect the well-being and tranquility of a community." *Kovacs* v. *Cooper, supra*, 336 U.S. at 83. If a special community character can be preserved through a reasonable reduction of noise, through zoning primarily for families, *Village of Belle Terre* v. *Boraas*, 416 U.S. 1 (1974), or through distance requirements placed on "adult" theaters to preserve "the present and future character of . . . neighborhoods," *Young* v. *American Mini Theatres*, 427 U.S. 50, 72 (1976), it would seem that petitioners have at least a colorable right to demonstrate the unique character of Skokie as the setting for the prospective group tort in this case. The hostile penetration into their sanctuary, in fact and in the flesh,—hardly a voluntary television show*—will condition and exacerbate the harm of which petitioners complain. Yet they were given no opportunity even to explain their case before its dismissal.

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* Similar unfamiliarity with petitioners' contentions, although without directly affecting their litigation, was displayed by the United States Court of Appeals in *Collin* v. *Smith*, 7th Cir. Nos. 78-1381 and 78-1385 (May 22, 1978), at page 15, fn. 16: "Ironically the witnessing of the television show "Holocaust" might seem to have the same trauma producing possibilities. The extent to which the residents of Skokie may have *willingly exposed themselves* to the painful reminder of this production might have been pertinent to the psychic trauma issue if the airing had occurred prior to the district court evidentiary hearing." (Emphasis added) The Seventh Circuit's sympathetic but misinformed handling of this issue—sorely confusing art, therapy and life—is further proof of the fundamental notion embodied in standing requirements that a directly injured party will most effectively advocate his position.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of Illinois.

Respectfully submitted,

SOL GOLDSTEIN, on his own behalf, and on behalf of a class similarly situated, Petitioner

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APPENDIX

APPENDIX

OPINION

SUPREME COURT OF ILLINOIS

United States of America

State of Illinois)
) ss.
Supreme Court)

At a Term of the Supreme Court, begun and held in Springfield, on Monday, the ninth day of January in the year of our Lord, one thousand nine hundred and seventy-eight, within and for the State of Illinois.

Present: Daniel P. Ward, Chief Justice
Justice Robert C. Underwood
Justice Howard C. Ryan
Justice Thomas J. Moran
Justice Joseph H. Goldenhersh
Justice William G. Clark
Justice James A. Dooley

William J. Scott, Attorney General

Louie F. Dean, Marshal

Attest: Clell L. Woods, Clerk

Be It Remembered, that afterwards, to-wit, on the 27th day of January, 1978, the opinion of the Court was filed in said cause and entered of record in the words and figures following, to-wit:

Village of Skokie, a municipal corporation,

Appellee

No. 49769 vs.

National Socialist Party of America, et al.,

Appellants

Appeal from Appellate Court, First District.
Clell L. Woods
Clerk of the Supreme Court
State of Illinois
Docket No. 49769—Agenda 18—September 1977.

THE VILLAGE OF SKOKIE, Appellee v. NATIONAL SOCIALIST PARTY OF AMERICA *et al.*, Appellants.

PER CURIAM: Plaintiff, the village of Skokie, filed a complaint in the circuit court of Cook County seeking to enjoin defendants, the National Socialist Party of America (the American Nazi Party) and 10 individuals as "officers and members" of the party, from engaging in certain activities while conducting a demonstration within the village. The circuit court issued an order enjoining certain conduct during the planned demonstration. The appellate court modified the injunction order, and, as modified, defendants are enjoined from "[i]ntentionally displaying the swastika on or off their persons, in the course of a demonstration, march, or parade." (51 Ill. App. 3d 279, 295.) We allowed defendants' petition for leave to appeal.

The pleadings and the facts adduced at the hearing are fully set forth in the appellate court opinion, and only those matters necessary to the discussion of the issues will be repeated here. The facts are not disputed.

It is alleged in plaintiff's complaint that the "uniform of the National Socialist Party of America consists of the storm trooper uniform of the German Nazi Party embellished with the Nazi swastika"; that the plaintiff village has a population of about 70,000 persons of which approximately 40,500 persons are of "Jewish religion or Jewish ancestry" and of this latter number 5,000 to 7,000 are survivors of German concentration camps; that the defendant organization is "dedicated to the incitation of racial and religious hatred directed principally against individuals of Jewish faith or ancestry and non-Caucasians"; and that its members "have patterned their conduct, their uniform, their slogan and their tactics along the pattern of the German Nazi Party * * *."

Defendants moved to dismiss the complaint. In an affidavit attached to defendants' motion to dismiss, defendant Frank Collin, who testified that he was "party leader," stated that on or about March 20, 1977, he sent officials of the plaintiff village a letter stating that the party members and supporters would hold a peaceable, public assembly in the village on May 1, 1977, to protest the Skokie Park District's requirement that the party procure $350,000 of insurance prior to the party's use of the Skokie public parks for public assemblies. The demonstration was to begin at 3 p.m., last 20 to 30 minutes, and consist of 30 to 50 demonstrators marching in single file, back and forth, in front of the village hall. The marchers were to wear uniforms which include a swastika emblem or armband. They were to carry a party banner containing a swastika emblem and signs containing such statements as "White Free Speech," "Free Speech for the White Man," and "Free Speech for White America." The demonstrators would not distribute handbills, make any derogatory statements directed to any

ethnic or religious group, or obstruct traffic. They would cooperate with any reasonable police instructions or requests.

At the hearing on plaintiff's motion for an "emergency injunction" a resident of Skokie testified that he was a survivor of the Nazi holocaust. He further testified that the Jewish community in and around Skokie feels the purpose of the march in the "heart of the Jewish population" is to remind the two million survivors "that we are not through with you" and to show "that the Nazi threat is not over, it can happen again." Another resident of Skokie testified that as the result of defendants' announced intention to march in Skokie, 15 to 18 Jewish organizations, within the village and surrounding area, were called and a counterdemonstration of an estimated 12,000 to 15,000 people was scheduled for the same day. There was opinion evidence that defendants' planned demonstration in Skokie would result in violence.

The circuit court entered an order enjoining defendants from "marching, walking or parading in the uniform of the National Socialist Party of America; marching, walking or parading or otherwise displaying the swastika on or off their person; distributing pamphlets or displaying any materials which incite or promote hatred against persons of Jewish faith or ancestry or hatred against persons of any faith or ancestry, race or religion" within the village of Skokie. The appellate court, as earlier noted, modified the order so that defendants were enjoined only from intentional display of the swastika during the Skokie demonstration.

The appellate court opinion adequately discussed and properly decided those issues arising from the portions of the injunction order which enjoined defendants from

marching, walking, or parading, from distributing pamphlets or displaying materials, and from wearing the uniform of the National Socialist Party of America. The only issue remaining before this court is whether the circuit court order enjoining defendants from displaying the swastika violates the first amendment rights of those defendants.

In defining the constitutional rights of the parties who come before this court, we are, of course, bound by the pronouncements of the United States Supreme Court in its interpretation of the United States Constitution. (*Abelman* v. *Booth* (1859), 62 U.S. (21 How.) 506, 16 L. Ed. 169; *Cooper* v. *Aaron* (1958), 358 U.S. 1, 3 L. Ed. 2d 1, 78 S. Ct. 1401.) The decisions of that court, particularly *Cohen* v. *California* (1971), 403 U.S. 15, 29 L. Ed. 2d 284, 91 S. Ct. 1780, in our opinion compel us to permit the demonstration as proposed, including display of the swastika.

"It is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers" (*Bachellar* v. *Maryland* (1970), 397 U.S. 564, 567, 25 L. Ed. 2d 570, 574, 90 S. Ct. 1312, 1315), and it is entirely clear that the wearing of distinctive clothing can be symbolic expression of a thought or philosophy. The symbolic expression of thought falls within the free speech clause of the first amendment (*Tinker* v. *Des Moines Independent Community School District* (1969), 393 U.S. 503, 21 L. Ed. 2d 731, 89 S. Ct. 733), and the plaintiff village has the heavy burden of justifying the imposition of a prior restraint upon defendants' right to freedom of speech (*Carroll* v. *President of Princess Anne County* (1968), 393 U.S. 175, 21 L. Ed. 2d 325, 89 S. Ct. 347; *Organization for a Better Austin* v. *Keefe* (1971), 402 U.S. 415, 29 L. Ed. 2d 1, 91 S. Ct. 1575).

The village of Skokie seeks to meet this burden by application of the "fighting words" doctrine first enunciated in *Chaplinsky* v. *New Hampshire* (1942), 315 U.S. 568, 86 L. Ed. 1031, 62 S. Ct. 766. That doctrine was designed to permit punishment of extremely hostile personal communication likely to cause immediate physical response, "no words being 'forbidden except such as have a direct tendency to cause acts of violence by the persons to whom, individually, the remark is addressed.'" (315 U.S. 568, 573, 86 L. Ed. 1031, 1036, 62 S. Ct. 766, 770.) In *Cohen* the Supreme Court restated the description of fighting words as "those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction." (403 U.S. 15, 20, 29 L. Ed. 2d 284, 291, 91 S. Ct. 1780, 1785.) Plaintiff urges, and the appellate court has held, that the exhibition of the Nazi symbol, the swastika, addresses to ordinary citizens a message which is tantamount to fighting words. Plaintiff further asks this court to extend *Chaplinsky,* which upheld a statute punishing the use of such words, and hold that the fighting-words doctrine permits a prior restraint on defendants' symbolic speech. In our judgment we are precluded from doing so.

In *Cohen,* defendant's conviction stemmed from wearing a jacket bearing the words "Fuck the Draft" in a Los Angeles County courthouse corridor. The Supreme Court for reasons we believe applicable here refused to find that the jacket inscription constituted fighting words. That court stated:

> "The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours. It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced

> largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests. See *Whitney* v. *California,* 274 U.S. 357, 375-377. (1927) (Brandeis, J., concurring).
>
> To many, the immediate consequence of this freedom may often appear to be only verbal tumult, discord, and even offensive utterance. These are, however, within established limits, in truth necessary side effects of the broader enduring values which the process of open debate permits us to achieve. That the air may at times seem filled with verbal cacophony is, in this sense not a sign of weakness but of strength. We cannot lose sight of the fact that, in what otherwise might seem a trifling and annoying instance of individual distasteful abuse of a privilege, these fundamental societal values are truly implicated. * * * 'so long as the means are peaceful, the communication need not meet standards of acceptability,' *Organization for a Better Austin* v. *Keefe,* 402 U.S. 415, 419 (1971).
>
> Against this perception of the constitutional policies involved, we discern certain more particularized considerations that peculiarly call for reversal of this conviction. First, the principle contended for by the State seems inherently boundless. How is one to distinguish this from any other offensive word [emblem]? Surely the State has no right to cleanse public debate to the point where it is grammatically palatable to the most squeamish among us. Yet no readily ascertainable general principle exists for stopping short of that result were we to affirm the judgment below. For, while the particular four-letter word [emblem] being litigated here is perhaps more distasteful than most others of its genre, it is nevertheless often true that one man's vulgarity is another's lyric. Indeed, we think it is largely because governmental officials cannot make principled distinctions in this area that the

Constitution leaves matters of taste and style so largely to the individual.

• • •

Finally, and in the same vein, we cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process. Indeed, governments might soon seize upon the censorship of particular words [emblems] as a convenient guise for banning the expression of unpopular views. We have been able, as noted above, to discern little social benefit that might result from running the risk of opening the door to such grave results." 403 U.S. 15, 24-26, 29 L. Ed. 2d 284, 293-94, 91 S. Ct. 1780, 1787-88.

The display of the swastika, as offensive to the principles of a free nation as the memories it recalls may be, is symbolic political speech intended to convey to the public the beliefs of those who display it. It does not, in our opinion, fall within the definition of "fighting words," and that doctrine cannot be used here to overcome the heavy presumption against the constitutional validity of a prior restraint.

Nor can we find that the swastika, while not representing fighting words, is nevertheless so offensive and peace threatening to the public that its display can be enjoined. We do not doubt that the sight of this symbol is abhorrent to the Jewish citizens of Skokie, and that the survivors of the Nazi persecutions, tormented by their recollections, may have strong feelings regarding its display. Yet it is entirely clear that this factor does not justify enjoining defendants' speech. The *Cohen* court spoke to this subject:

"Finally, in arguments before this Court much has been made of the claim that Cohen's distasteful mode of expression was thrust upon unwilling or unsuspecting viewers, and that the State might therefore legiti-

mately act as it did in order to protect the sensitive from otherwise unavoidable exposure to appellant's crude form of protest. Of course, the mere presumed presence of unwitting listeners or viewers does not serve automatically to justify curtailing all speech capable of giving offense. See, *e.g., Organization for a Better Austin* v. *Keefe,* 402 U.S. 415 (1971). While this Court has recognized that government may properly act in many situations to prohibit intrusion into the privacy of the home of unwelcome views and ideas which cannot be totally banned from the public dialogue, *e.g., Rowan* v. *Post Office Dept.,* 397 U.S. 728 (1970), we have at the same time consistently stressed that 'we are often "captives" outside the sanctuary of the home and subject to objectionable speech.' *Id.,* at 738. The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is, in other words, dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner. Any broader view of this authority would effectively empower a majority to silence dissidents simply as a matter of personal predilections." 403 U.S. 15, 21, 29 L. Ed. 2d 284, 291-92, 91 S. Ct. 1780, 1786.

See also *Kunz* v. *New York* (1951), 340 U.S. 290, 95 L. Ed. 280, 71 S. Ct. 312; *Street* v. *New York* (1969), 394 U.S. 576, 22 L. Ed. 2d 572, 89 S. Ct. 1354.

Similarly, the Court of Appeals for the Seventh Circuit, in reversing the denial of defendant Collin's application for a permit to speak in Chicago's Marquette Park, noted that courts have consistently refused to ban speech because of the possibility of unlawful conduct by those opposed to the speaker's philosophy.

"Starting with Terminiello v. City of Chicago, 337 U.S. 1, 69 S. Ct. 894, 93 L. Ed. 1131 (1949), and continuing to Gregory v. City of Chicago, 394 U.S. 111, 89 S. Ct. 946, 22 L. Ed. 134 (1969), it has become patent

that a hostile audience is not a basis for restraining otherwise legal First Amendment activity. As with many of the cases cited herein, if the actual behavior is not sufficient to sustain a conviction under a statute, then certainly the anticipation of such events cannot sustain the burden necessary to justify a prior restraint." *Collin* v. *Chicago Park District* (7th Cir. 1972), 460 F.2d 746, 754.

Rockwell v. *Morris* (1961), 12 App. Div. 2d 272, 211 N.Y.S.2d 25, *aff'd mem.* (1961), 10 N.Y.2d 721, 749, 219 N.Y.S.2d 268, 605, *cert. denied* (1961), 368 U.S. 913, 7 L. Ed. 2d 131, 82 S. Ct. 194, also involved an American Nazi leader, George Lincoln Rockwell, who challenged a bar to his use of a New York City park to hold a public demonstration where anti-Semitic speeches would be made. Although approximately 2½ million Jewish New Yorkers were hostile to Rockwell's message, the court ordered that a permit to speak be granted, stating:

"A community need not wait to be subverted by street riots and storm troopers; but, also, it cannot, by its policemen or commissioners, suppress a speaker, in prior restraint, on the basis of news reports, hysteria, or inference that what he did yesterday, he will do today. Thus, too, if the speaker incites others to immediate unlawful action he may be punished—in a proper case, stopped when disorder actually impends; but this is not to be confused with unlawful action from others who seek unlawfully to suppress or punish the speaker.

So, the unpopularity of views, their shocking quality, their obnoxiousness, and even their alarming impact is not enough. Otherwise, the preacher of any strange doctrine could be stopped; the anti-racist himself could be suppressed, if he undertakes to speak in 'restricted' areas; and one who asks that public schools be open indiscriminately to all ethnic groups could be lawfully suppressed, if only he choose to speak where

persuasion is needed most." 12 App. Div. 2d 272, 281-82, 211 N.Y.S.2d 25, 35-36.

In summary, as we read the controlling Supreme Court opinions, use of the swastika is a symbolic form of free speech entitled to first amendment protections. Its display on uniforms or banners by those engaged in peaceful demonstrations cannot be totally precluded solely because that display may provoke a violent reaction by those who view it. Particularly is this true where, as here, there has been advance notice by the demonstrators of their plans so that they have become, as the complaint alleges, "common knowledge" and those to whom sight of the swastika banner or uniforms would be offensive are forewarned and need not view them. A speaker who gives prior notice of his message has not compelled a confrontation with those who voluntarily listen.

As to those who happen to be in a position to be involuntarily confronted with the swastika, the following observations from *Erznoznik* v. *City of Jacksonville* (1975), 422 U.S. 205, 45 L. Ed. 2d 125, 95 S. Ct. 2268, are appropriate:

"The plain, if at all times disquieting, truth is that in our pluralistic society, constantly proliferating new and ingenious forms of expression, 'we are inescapably captive audiences for many purposes.' *Rowan* v. *Post Office Dept.*, [397 U.S. 728,] 736. Much that we encounter offends our esthetic, if not our political and moral, sensibilities. Nevertheless, the Constitution does not permit government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer. Rather, absent the narrow circumstances described above [home intrusion or captive audience], the burden normally falls upon the viewer to 'avoid further bombardment of [his] sensibilities simply by averting [his] eyes.' *Cohen* v. *California* [403 U.S. 15.] 21." 422 U.S. 205, 210-11, 45 L. Ed. 2d 125, 131-32, 95 S. Ct. 2268, 2273.

Thus by placing the burden upon the viewer to avoid further bombardment, the Supreme Court has permitted speakers to justify the initial intrusion into the citizen's sensibilities.

We accordingly, albeit reluctantly, conclude that the display of the swastika cannot be enjoined under the fighting-words exception to free speech, nor can anticipation of a hostile audience justify the prior restraint. Furthermore, *Cohen* and *Erznoznik* direct the citizens of Skokie that it is their burden to avoid the offensive symbol if they can do so without unreasonable inconvenience. Accordingly, we are constrained to reverse that part of the appellate court judgment enjoining the display of the swastika. That judgment is in all other respects affirmed.

Affirmed in part and reversed in part.

MR. JUSTICE CLARK, dissenting.

Supreme Court, U. S.
FILED
SEP 19 1978
MICHAEL RODAK, JR., CLERK

No. 77-1788

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

SOL GOLDSTEIN, on his own behalf and on behalf of a class similarly situated,

Petitioner,

vs.

FRANCIS JOSEPH COLLIN, a/k/a **FRANK COLLIN**, and all persons acting in concert with him under the name of the National Socialist Party of America,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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Midwest Law Printing Co., Chicago 60601, FInancial 6-3988

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Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Respondents pray that the requested Writ of Certiorari not issue to review the judgment of the Supreme Court of Illinois entered on January 27, 1978.

OPINION BELOW

The Petition for Writ of Certiorari is filed from the order and opinion of the Supreme Court of Illinois, set forth in the Petition at pp. 1-2.

REASONS FOR DENYING CERTIORARI

I. The Case Is Moot.

II. The Illinois Supreme Court Was Correct in Holding That Plaintiff Sought a Prior Restraint in Violation of the First Amendment.

III. Petitioner's Claim That He Was Denied a Hearing Is Frivolous.

STATEMENT OF THE CASE

This case arises out of the scheduling of a now-cancelled public assembly in Skokie, Illinois, by respondents Frank Collin and the National Socialist Party of America. The assembly was to have occurred on May 1, 1977, and was to have consisted of 30 to 50 members of the party wearing military-style uniforms and would have included the swastika emblem. Party members had planned to picket silently on the sidewalk in front of the Village Hall carrying signs stating "Free Speech for White People," and the like.

Four separate lawsuits arose out of the scheduling of that assembly. The first complaint was filed on April 27, 1977, in the Circuit Court of Cook County, by the Village of Skokie on behalf of its residents. The suit sought to prevent the demonstration on grounds that it would provoke disorder and would inflict psychic trauma on large numbers of the residents. (*Village of Skokie* v. *National Socialist Party of America*, #77 Ch 2702, Complaint, ¶ 10-11.) The Village procured an injunction which barred respondents from appearing anywhere in Skokie in uniform, from wearing the swastika emblem, and from disseminating party literature. The petitioner here was Skokie's chief witness in that case, and the Illinois courts relied explicitly on his testimony in his capacity as a Holocaust survivor in first authorizing and then vacating the injunction. That case came to this Court on a procedural issue which was decided and remanded on June 14, 1977. *National Socialist Party of America* v. *Village of Skokie*, 432 U.S. 43 (1977). On January 27, 1978, the Illinois Su-

preme Court vacated the injunction. *Village of Skokie* v. *National Socialist Party of America,* 69 Ill. 2d 605 (1978).

When the Circuit Court of Cook County entered the injunction against the May 1 assembly in Skokie, respondents rescheduled it for July 4, 1977. After this Court ordered the Illinois courts to grant expedited review of the injunction in the *Skokie* case, and while that injunction was still in force, petitioner Goldstein filed the present case. Petitioner's complaint sought relief against the July 4 assembly substantially identical to that which had already been obtained in the *Skokie* case and in which Goldstein had already testified. The injunction in the *Skokie* case was still in effect, pending appellate review; therefore, petitioner sought no preliminary relief in the present case. (See Petition for Certiorari, p. 5, fn.)

On July 28, 1977, respondents filed a motion to dismiss the *Goldstein* case arguing, *inter alia,* that the Illinois courts were being asked to impose a prior restraint against speech, and since prior restraints are held to be unconstitutional, the case should be dismissed. Petitioner responded to the motion with a detailed 30-page legal memorandum of which all but the last six pages were devoted to the facts and law in support of the constitutionality of a prior restraint against respondents' assembly. (The last six pages addressed procedural questions such as standing and whether the action previously filed by Skokie barred petitioner's case.) On August 1, 1977, the Circuit Court of Cook County denied the respondents' motion to dismiss, simultaneously certifying the prior-restraint question for interlocutory appeal. (Rule 308, Rules of the Illinois Supreme Court.)

As provided for by Illinois law, respondents petitioned the Illinois Appellate Court for leave to appeal. That petition was denied on November 12, 1977. Thereupon, respondents filed a "Petition for Leave to Appeal Question Certified Below or a Supervisory Order" in the Illinois Supreme Court. In support of that petition, respondents attached all briefs submitted by the parties in the trial court.

During the same time period, respondents were granted leave to appeal to the Illinois Supreme Court from the injunction against the assembly obtained in the *Skokie* case. That case was argued on September 20, 1977.

On January 27, 1978, the Illinois Supreme Court decided both the *Skokie* and the *Goldstein* cases. In the *Skokie* case, it held that the injunction obtained by the Village, *and sought by petitioner Goldstein,* was an unconstitutional prior restraint on speech. Thus the Court stated:

> In summary, as we read the controlling Supreme Court opinions, the use of the swastika is a symbolic form of free speech entitled to First Amendment protections. Its display on uniforms or banners by those engaged in peaceful demonstrations cannot be totally precluded solely because that display would provoke a violent reaction by those who view it. Particularly is this true where, as here, there has been advance notice by the demonstrators of their plans so that they have become, as the complaint alleges, "common knowledge" and those to whom the sight of the swastika, banner or uniforms would be offensive are forewarned and need not view them. A speaker who gives prior notice of his message has not compelled a confrontation with those who voluntarily listen. *Village of Skokie* v. *National Socialist Party of America, supra.,* at 618.

In the *Goldstein* case, the Court held that the decision in the *Skokie* case was controlling:

> The Circuit Court of Cook County denied a motion to dismiss a complaint for injunction seeking to restrain defendants from marching and demonstrating in the Village of Skokie while wearing or displaying Nazi insignia. The Appellate Court denied a petition for leave to appeal under Rule 308 and defendants have petitioned this Court for leave to appeal. In *Village of Skokie* v. *National Socialist Party of America,* No. 49769, adopted this term, we held that the proposed march or demonstration and the display of Nazi insignia could not be enjoined. The petition for leave to appeal is allowed and, in the exercise of this Court's supervisory jurisdiction, it is ordered that the Circuit Court of Cook County dismiss the injunction complaint. Clark, J. took no part. *Goldstein* v. *Collin,* #50176, Illinois Supreme Court, January 27, 1978.

The Village did not seek a writ of certiorari from this Court in the *Skokie* case. Petitioner Goldstein filed his petition for certiorari in this case on June 16, 1978. He also unsuccessfully sought stays on June 20 and 23, 1978. (A-1064)

The third suit was filed on August 13, 1977, in the United States District Court by respondents to challenge the constitutionality of certain ordinances passed by the Village of Skokie to bar respondents' public assembly. Again, petitioner Goldstein testified at length on behalf of the Village as to his Holocaust experiences. The Village also presented other testimony concerning allegations of psychic trauma which it contended would result from respondents' activities in Skokie. On February 23, 1978, the District Court held that relevant portions of the ordinances were unconstitutional, *Collin* v. *Smith,* 447 F. Supp. 676 (1978); and on May 22, 1978, the United States Court of

Appeals for the Seventh Circuit affirmed that decision, ... F. 2d ..... (7th Cir., #78-1385, May 22, 1978). On June 12, this Court denied a motion for a stay pending a ruling on a Petition for Certiorari. (*Smith* v. *Collin,* A-1037). The Village filed its Petition for Writ of Certiorari with this Court on June 16, 1978. (*Smith* v. *Collin,* 77-1736.) Thereafter, the Village granted a permit for respondents to hold a public assembly in Skokie on June 25, 1978.

On June 22, 1978, another lawsuit was filed in the Circuit Court of Cook County seeking to enjoin respondents' assembly. Louis Black, a private citizen, filed the suit charging that the Village's permit was wrongfully issued. *Black* v. *Village of Skokie,* No. 78 L 12287. Preliminary relief to enjoin the June 25th assembly was denied by the Circuit Court of Cook County.

By June 22, 1978, all legal barriers to respondents' planned assembly had been removed. However, respondents cancelled the June 25th assembly in Skokie and held assemblies at two separate locations in Chicago instead. In reliance on respondents' announcement of cancellation of the assembly, the Village of Skokie revoked the permit on June 23, 1978. (Ex. 1) At present, respondents have no plans to hold an assembly in Skokie, and no permit applications for such an assembly are pending at this time.

REASONS FOR DENYING CERTIORARI

The Petition for Writ of Certiorari should be denied in this case because the case has become moot and because petitioner presents no substantial federal questions.

I. THE CASE IS MOOT.

The petitioner's case is moot. His prayer asked for an order restraining an assembly on June 4, 1977. That date has long since passed and the assembly in question has been cancelled. (Ex. 1) Specifically, the prayer states:

> Wherefore, plaintiff, on his own behalf and on behalf of all those similarly situated, prays this Court for issuance of a preliminary and permanent injunctive relief restraining Frank Collin, his agents, employees, successors, and all those acting in concert with him, including those acting in the name of the National Socialist Party of America, from engaging in any demonstration, rally, parade, or march of any kind or description, in or through the Village of Skokie, Illinois, at which the uniform of the Nazi party (including brown shirts or swastika armbands) is worn by the participants, or the insignia of the Nazi party are displayed, and from engaging in any said demonstration, rally, parade or march in or through the Village of Skokie on *July 4, 1977.* (Complaint, p. 7) (Emphasis added.)

In light of the cancellation of respondents' assembly and the limitation of the relief prayed for to any demonstration on July 4, 1977, a decision by this Court to review the petitioner's case would resurrect a dispute which has become purely academic. Moreover, issuance of a ruling on the constitutional questions raised by petitioner would

amount to an advisory opinion. This Court has repeatedly held that it does not issue advisory opinions. In *Golden* v. *Zwickler,* 394 U.S. 103 (1969), this Court reaffirmed this position:

> [T]he federal courts established pursuant to Article III of the Constitution do not render advisory opinions. For adjudication of Constitutional issues, concrete legal issues, presented in actual cases, not abstractions are requisite. This is as true of declaratory judgments as in any other field. (Quoted *from United Public Workers of America* v. *Mitchell,* 330 U.S. 75, 89 (1947).)

The application of this principle is particularly important here because the petitioner seeks injunctive relief only on a single date for an event that has been cancelled. His complaint does not even seek declaratory relief.

The cancellation of the event in question also renders this case moot under *Sosna* v. *Iowa,* 419 U.S. 393 (1975), and *Weinstein* v. *Bradford,* 423 U.S. 147 (1975). Those cases defined the reach of the mootness doctrine under circumstances "capable of repetition yet evading review" because the challenged action was too short in duration to permit the litigation to be completed. In such cases, the Court said:

> *Sosna* decided that in the absence of a class action, the "capable of repetition, yet evading review" doctrine was limited to the situation where two elements combined: (1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again. *Weinstein* v. *Bradford,* 423 U.S., at 149.

The present case—not an action in which a class was ever certified or in which a motion to certify was made—does not meet either of the requirements articulated in *Weinstein*. First, the right of respondents to assemble and speak in Skokie has been fully litigated in the Illinois and federal courts, each court ruling for respondents. *Village of Skokie* v. *National Socialist Party of America*, 69 Ill. 2d 605 (1978); *Collin* v. *Smith*, 447 F. Supp. 676 (N.D. Ill. 1978), affirmed ..... F. 2d ..... (7th Circuit, #78-1385, May 22, 1978). Second, there are no permit applications pending and no plans for any assembly in Skokie by respondents. Thus, the likelihood of repetition—particularly where, as here, there has never been any public appearance in Skokie by respondents—does not exist.

The likelihood of repetition is only a hypothetical possibility. Yet, as this Court has emphatically stated: "A hypothetical threat is not enough." *United Public Workers of America* v. *Mitchell*, 330 U.S., at 90. "The constitutional question, First Amendment or otherwise, must be presented in the context of a specific live grievance." *Golden* v. *Zwickler*, 394 U.S., at 110.

II. THE ILLINOIS SUPREME COURT WAS CORRECT IN HOLDING THAT PLAINTIFF SOUGHT A PRIOR RESTRAINT IN VIOLATION OF THE FIRST AMENDMENT.

A prior restraint against a public assembly, the wearing of military-style uniforms, and displaying of a symbol is forbidden by the First Amendment. That the Constitution prohibits prior restraints on speech is beyond dispute. The United States Supreme Court has repeatedly held so in innumerable cases. Most recently in *Nebraska Press Association* v. *Stuart*, 427 U.S. 539 (1976), Chief Justice Burger, speaking for the Court observed:

> The thread running through all of these cases is that *prior restraints* on speech and publication *are the most serious and the least tolerable infringement on First Amendment rights*. 427 U.S., at 559. (Emphasis added.)

In *Organization for a Better Austin* v. *Keefe*, 402 U.S. 415 (1971), this Court explicitly ordered the Illinois courts to vacate an injunction against leafletting anywhere in a specified municipality on grounds that such an injunction is presumptively illegal:

> Any prior restraint on expression comes to this court with a "heavy presumption" against its constitutional validity. *Organization for a Better Austin* v. *Keefe*, 402 U.S., at 419.

The presumption of unconstitutionality of an injunction serving as a prior restraint issued by state court judges was articulated long ago in *Near* v. *Minnesota*, 283 U.S. 697 (1931), and remains black letter law today. In *Near*, the United States Supreme Court invalidated an injunction, barring publication of allegedly libelous material, granted by a state court at the instance of the county attorney of Hennepin County, Minnesota. The injunction forbade publication of a local newspaper as a "public nuisance" on the ground that it had engaged in a "malicious, scandalous and defamatory" libel by accusing the mayor and the chief of police of being under the control of a "Jewish gangster." In rejecting the injunction because it was a prior restraint, the Supreme Court cited Blackstone:

> The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no *previous* restraints upon publications and not in freedom from censure for criminal matter when published. Every free man has an undoubted right to lay what

> sentiments he pleases before the public; to forbid this is to destroy the freedom of the press; but if he publishes what is improper, mischievous or illegal, he must take the consequences of his own temerity. 283 U.S., at 714, citing 4 Bl.Comm. 151, 152.

There is no case cited by petitioner which upholds an injunction against political communication based upon its content. Thus, the Illinois Supreme Court order dismissing the complaint seeking an injunction against speech and assembly is consistent with all previous authority of this Court and does not warrant review of the decision of the Supreme Court of Illinois by this Court.

III. PETITIONER'S CLAIM THAT HE WAS DENIED A HEARING IS FRIVOLOUS.

Finally, petitioner contends that he was denied due process because the Illinois Supreme Court relied on the pleadings and detailed briefs submitted to the Circuit Court of Cook County, as well as the ruling in the Village's own case, in ordering the complaint dismissed.

The implication in petitioner's Statement of Facts that the Illinois Supreme Court considered no briefs on the merits is misleading, as is his contention that he did not participate in the Skokie litigation. (Petition, pp. 6-7.) The record before the Illinois Supreme Court consisted of respondents' petition for interlocutory appeal of denial of their motion to dismiss, petitioner's response, and all briefs filed in the trial court, including petitioner's 60-page brief detailing his contentions. Furthermore, the Illinois Supreme Court had the entire record in the *Village of Skokie* v. *National Socialist Party of America* before it, including the full testimony of petitioner Goldstein who had served as the chief witness in that case.

That the Illinois Supreme Court could choose to consider pleadings and lengthy briefs (not to mention petitioner's testimony in the *Skokie* case) in determining the sufficiency of the complaint under state appeals procedures is a matter within the discretion of the court. It is well established that matters of state practice are left to the state courts and are not appropriate for review in the United States Supreme Court. *Allen* v. *Allegheny Co.*, 196 U.S. 458, 465-466 (1905); *Yazoo & Mississippi Valley Railway Company* v. *Adams*, 180 U.S. 1, 8-9 (1901). Principles of federalism require such deference by this Court. See *Rizzo* v. *Goode*, 423 U.S. 362 (1976).

The sole exception to this rule is made when state practice is so extremely arbitrary as to deny due process. *Kentucky Union Co.* v. *Kentucky*, 219 U.S. 140, 158-161 (1911). Petitioner can complain of no such arbitrariness. The Illinois Supreme Court decided only a question of law determining whether or not the respondents' motion to dismiss the complaint seeking injunctive relief should be granted. The Court had before it not only the extensive briefs filed in this case, but also the record in the *Skokie* case including petitioner Goldstein's own testimony, which the Illinois courts referred to in their opinions.*

In light of the record before the Illinois Supreme Court, petitioner's claim that he was denied a hearing in that Court is without any support legally or factually. It is, thus, frivolous and cannot serve as a basis for the granting of a petition for a writ of certiorari.

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* Petitioner lists four points which he claims he could not adequately make. (Petition, pp. 14-16). In fact, each of petitioner's points is made at great length in the brief and reply to plaintiff's petition submitted by him in the Illinois courts.

CONCLUSION

For the foregoing reasons, the respondents respectfully submit that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENTS

APPENDIX

Exhibit 1

The VILLAGE OF SKOKIE
673-0500
5127 OAKTON ST. • SKOKIE, ILL. 60076

SKOKIE ILLINOIS

OFFICE OF THE VILLAGE MANAGER

June 23, 1978

Mr. Frank Collin
National Socialist Party of America
Rockwell Hall
2519 W. 71st Street
Chicago, Illinois 60629

Dear Mr. Collin:

This is to formally advise you of the action taken by the President and Board of Trustees of Skokie on June 22, 1978. In view of your public statement of intention to cancel your demonstration assembly in Skokie on June 25, 1978, the permit heretofore issued in conjunction with that assembly has been revoked.

Very truly yours,

John Matzer, Jr.
Village Manager

JM:re
cc: Mr. David Goldberger ✓
American Civil Liberties Union

Harvey Schwartz
Corporation Counsel

Supreme Court, U. S.
FILED
SEP 29 1978
MICHAEL RODAK, JR., CLERK

No. 77-1788

In the Supreme Court of the United States

SPRING TERM, 1978

SOL GOLDSTEIN, on his own behalf and on behalf of a class similarly situated,

Petitioner,

vs.

FRANCIS JOSEPH COLLIN, a/k/a **FRANK COLLIN**, and all persons acting in concert with him under the name of **The National Socialist Party of America**,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Illinois

---

PETITIONER'S REPLY BRIEF ON RESPONDENTS' SUGGESTION OF MOOTNESS

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Respondents.

On Petition for Writ of Certiorari to the
Supreme Court of Illinois

PETITIONER'S REPLY BRIEF ON RESPONDENTS' SUGGESTION OF MOOTNESS

Introduction

This cause is not moot. Although respondents cancelled their proposed demonstration in Skokie after the instant petition was filed and after petitioner's two emergency motions to Justices of this Court had been filed and denied. respondent Collin immediately stated to the press:

> "[That] does not mean I forego any future demonstration in Skokie," he said. "It means only this one has been cancelled." (*Chicago Tribune*, June 23, 1978, p. 1) (Exhibit 1, App. p. 1)

Thus, respondents in their Brief in Opposition to the Petition herein, can accurately represent:

> *At present*, respondents have no plans to hold an assembly in Skokie, and no permit applications for such an assembly are pending *at this time*. (Brief in Opp., p. 7) (emphasis added).

However, respondents have not abandoned the conduct of which petitioner complains. They have carefully maintained their option to stage a Nazi-style demonstration in a community of holocaust survivors. Although respondents seek to foreclose review here of the summary dismissal without any semblance of established procedure, of the survivors' complaint, that dismissal has a continuing impact upon the petitioner and the class he represents. The judgment below, if it remains extant, leaves the petitioner class with the overhanging threat of a rescheduling of a Nazi-style demonstration, at respondents' sole discretion should "agitation"* again suit their ends, and with a final state holding on record that the First Amendment absolutely bars legal recourse against even tortious aspects of the demonstration. Respondents' qualified cancellation does not render this case moot under the decisions of this Court.

---

* Elaborating on his eleventh hour cancellation respondent Collin stated:

> "The whole Skokie issue which began in March, 1977, was pure agitation on our part to force the system to restore our rights to free speech," he said. (Exhibit 1, p. 18, App. 2)

Argument

A voluntary discontinuance of challenged conduct does not *ipso facto* render the challenge moot and nonjusticiable. *Walling* v. *Helmerich & Payne, Inc.*, 323 U.S. 37 (1944); *U.S.* v. *W.T. Grant Company*, 345 U.S. 629 (1952); *Bus Employees* v. *Missouri*, 374 U.S. 74 (1963); *Buffalo Forge Co.* v. *United Steelworkers*, 428 U.S. 397 (1976); and *accord, Carroll* v. *President and Commissioners of Princess Anne*, 393 U.S. 175 (1968). Where the complaining party has an interest which continues to be exposed to the type of harm complained of, unlike *Sosna* v. *Iowa*, 419 U.S. 393 (1975) and *Weinstein* v. *Bradford*, 423 U.S. 147 (1975), the case or controversy continues in effect for jurisdictional purposes.

"The defendant is free to return to his old ways." *U.S.* v. *W.T. Grant Co., supra*, 345 U.S. at 632. *Grant* held a controversy justiciable despite a voluntary cessation and sworn disclaimer of intention to resume an interlocking directorate—something significantly stronger than respondents' bare cancellation of one demonstration. Even a strong disclaimer of the *Grant* type "does not suffice to make a case moot . . . ." *Id.* at 633

The suggestion of mootness in *Walling, supra*, was based on the voluntary relinquishment of a pay plan challenged as an evasion of federal overtime law. The Court stated:

> "Despite respondent's voluntary cessation of the challenged conduct, a controversy between the parties over the legality of the split-day plan still remains. Voluntary discontinuance of an alleged illegal activity does not operate to remove a case from the ambit of judicial power. See Hecht Co. v. Bowles, 321 US 321, 327, 88 L ed 754, 759, 64 S Ct 587; Otis & Co. v. Securities & Exch. Commission (CCA 6th) 106 F (2d) 579, 583,

> 584. Respondent has consistently urged the validity of the split-day plan and would presumably be free to resume the use of this illegal plan were not some effective restraint made. There is thus 'an actual controversy, and adverse interests,' . . . ." 323 U.S. at 43.

On point with *Walling* is the respondents' clear position in this case that they legally can and accordingly might reschedule the complained of demonstration in Skokie.

In *Buffalo Forge, supra,* the Court held a case involving an allegedly unlawful sympathy strike to present "a live controversy despite the J & M employees' return to the job." 428 U.S. 397 at 403, fn. 8. The disputed work stoppage, "though ended, might 'be resumed at any time in the near future at the direction of the International Union, otherwise.'" *Id.* at 403. Given the complaining employer's continuing exposure to the kind of harm at issue, the voluntary cessation did not render the case moot even though at the time of Supreme Court adjudication there were no evident plans for a resumption. Contrary to *Buffalo Forge* and the instant case, the *Weinstein* prisoner had no continuing exposure to the harm he had complained of beyond that faced by any other citizen. (The remaining *Sosna* class members faced continuing prejudice, not merely exposure, under challenged state residency requirement.)

Finally,* in *Carroll, supra,* the Court refused to dismiss as moot a First Amendment challenge to a ten-day restrain-

* Respondents also argue, for the first time, that since petitioner's complaint mentioned only the first date respondents scheduled for their demonstration petitioner has no basis for complaining as to later dates. Aside from the broad scope of equitable jurisdiction, respondents' consistent treatment of this action as live despite the date issue estops them from asserting it now, after significant reliance on their original position by the petitioner.

ing order whose operation had long since terminated. The Court's first citation was to *Bus Employees, supra,* a case involving the seizure of a business, stating its holding as follows:

> "[A]lthough the seizure had been terminated, the case was not moot because the labor dispute [which gave rise to the seizure] remains unresolved. There thus exists . . . not merely the speculative possibility of invocation of the [seizure law] in some future labor dispute, but the presence of an existing unresolved dispute which continues . . ." Quoted at 393 U.S. 175 at 178.

Although there was no mention in *Carroll* of any existing plan or intention by the Princess Anne officials to seek another restraining order against the *Carroll* group, the group's continuing activity and the officials' continuing opposition kept the constitutional issue justiciable:

> "The underlying question persists and is agitated by the continuing activities and program of petitioners: whether, by what processes, and to what extent the authorities of the local government may restrict petitioners in their rallies and public meetings." 393 U.S. at 179.

Lastly, because of the existence of the present underlying decision of the Illinois Supreme Court and the short time frame which would exist if respondents once again decided to demonstrate in Skokie, the issues presented here would, in all likelihood, evade judicial review.

Thus, very much alive in the instant case is the question, similar to that in *Carroll,* whether the First Amendment forecloses any and all consideration by a state court of equity of narrow injunctive relief against an admittedly

tortious and irreparable aspect* of a prospective demonstration. The dispute between the neo-Nazis and the holocaust survivors in Skokie has not abated because of respondents' latest unilateral cancellation of a demonstration. Petitioner and his class should not be required to remain in a state of legal and psychological jeopardy subject to a rescheduling of a Nazi-style demonstration in their community, with all the attendant trauma to be expected therefrom. The decisions of this Court do not require such a result.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of Illinois.

Respectfully submitted,

SOL GOLDSTEIN, on his own behalf, and on behalf of a class similarly situated, Petitioner
JEROME H. TORSHEN
ELLIOT L. BIEN
Counsel for Petitioner

* This case arises on a motion to dismiss, admitting the allegations of the complaint. Respondents have not challenged petitioner's statement that the law of the case is that the admitted allegations, as the trial court held, state a cause of action in tort and for equitable jurisdiction. Respondents claim only that the First Amendment provides them an absolute defense to their proposed conduct.

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APPENDIX

Chicago Tribune

Friday, June 23, 1978

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6 Sections 15¢

Exhibit 1

App. 1

Nazis cancel their march in Skokie

By Ronald Koziol
and Ralph Frammolino

THE NEO-Nazis will not march Sunday in Skokie, but they will have a demonstration at 4:30 p.m. Saturday in Chicago's Federal Building Plaza.

Frank Collin, head of the Chicago unit of the National Socialist (Nazi) Party of America, announced cancellation of the Skokie march at a press conference Thursday in Rockwell Hall, the party headquarters at 2519 W. 71st St.

"[That] does not mean I forego any future demonstrations in Skokie," he said. "It means only this one has been canceled."

Members of the Skokie board gathered in the Village Hall to watch a telecast of Collin's press conference, which lasted only a few minutes.

MAYOR ALBERT J. Smith immediately announced that the permit for the Sunday march was revoked "as of this time." Skokie fought a long and costly legal battle to prevent the march, only to lose in the courts. Still, he said he considered Collin's decision a victory.

"The whole purpose of our fight was not to have these people march in Skokie," Smith said. "Yes, this is a victory. . . . It is a triumph for all mankind, the philosophy represented by this group is an affront to fre men of all races and creeds. Their intended demonstration brought mental hardship not only on our residents, but on concerned people everywhere."

After Collin's announcement, sponsors called off a giant counter-demonstration that had been planned for Sunday afternoon on the grounds of Niles Township East High School.

"If the Nazis are not going to bring their despised symbols to Skokie, we do not want to encourage large numbers of people to come to that community," said David Smerling, president of the Jewish United Fund of Metropolitan Chicago and the Jewish Federation of Metropolitan Chicago.

THE PUBLIC AFFAIRS committee of the Jewish United Fund had acted as the umbrella group for 34 Jewish organizations which, along with various other organizations, were cooperating in plans for the counter-demonstration.

"We feel that this is a great victory for decency, morality, and humanity," Smerling said.

Meetings with community groups will start next week on what might be done about a neo-Nazi march planned for July 9 in Marquette Park on the Southwest Side.

A federal judge's go-ahead for that march was the move that prompted Collin to cancel the Skokie demonstration.

Rabbi H. Goren Perelmuter, president of the Chicago Board of Rabbis, said the leadership of the Jewish Council on Urban Affairs is in close touch with the black community. Some blacks have threatened to appear at the Nazi march.

Continued on page 18, col. 4

Nazis call off Skokie march

Continued from page one

July 9 in the park.

"IF CALLS COME for us, we will join them as we did in Selma and in Washington," Rabbi Pereimuter said.

"If the community calls for support to oppose the Nazis, we will be there," said Maynard Wishner, another spokesman for the group.

Herman H. Moses, national commander of the Jewish War Veterans, canceled his organization's plans to take part in weekend counter-demonstrations against the Nazis in Skokie and Chicago.

Gov. Thompson's office announced that plans were canceled to assemble units of the National Guard in Skokie to prevent violence if the Nazis had marched.

Sixty news reporters and cameramen jammed the Nazi Party headquarters for Collin's 6 p.m. press conference. Outside the front door were Rabbi Meir Kahane of the Conference of Jewish Activists and a handful of his followers.

"We expect to see you in Skokie, Collin," Rabbi Kahane shouted a few seconds before the door was closed and Collin began speaking.

Police asked Kahane and his group to move away, and they did.

Collin said the rally Saturday afternoon "is definitely on despite what else I say here today."

"THE WHOLE SKOKIE issue which began in March, 1977, was pure agitation on our part to force the system to restore our rights to free speech," he said.

He said the news media "not once ever reported why we were demonstrating in Skokie."

The neo-Nazis, who had won long legal battles in both state and federal courts to march in Skokie and to wear Nazi uniforms and symbols while there, were granted the right Tuesday by Federal Judge George N. Leighton to march July 9 in Marquette Park without posting a liability bond with the Chicago Park District.

Collin and other spokesmen for the Nazis had said they might call off the Skokie march if granted the right to march in the park. Last year Judge Leighton said the $350,000 bond required by the Chicago Park District was unconstitutional, violating the party's right to free speech and assembly. The district cut the bond to $60,000, which Collin and his followers were unable to put up.

Richard Troy, special counsel for the park district in the Collin case, said he did not know whether the district would appeal Judge Leighton's ruling and seek a delay in the Marquette Park march.

"This case has more facets than the Hope diamond and we are still looking at it," Troy said.

MEANWHILE, A man who described himself as a "free-lance problem solver" was arrested early Thursday after he admitted to police he intended to burn down the neo-Nazi headquarters—the same building where Collin eventually held his press conference.

Police arrested Irving Lewis, 28, of 525 W. Deming Pl., and charged him with possession of explosive materials after he pulled his car behind the headquarters. Lewis told police he had been inspired by the TV documentary "Holocaust."

Police said they found six bottles filled with gasoline in Lewis' car. The bottles were fitted with paper wicks.

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